Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 97.

THE UNION STEAMBOAT COMPANY, CLAIMANT OF THE PROPELLER NEW YORK,

Petitioner,

VS.

THE ERIE & WESTERN TRANSPORTATION COMPANY, ET AL.

BRIEF FOR THE ERIE & WESTERN TRANSPORTATION COMPANY.

Brief for petitioner gives the history of the litigation, except that to the statement (p. 2) that no answer was filed to the cross-libel there should be added the following by the District Judge, (in answer to the alternative writ, 178 U. S. 317,)

> "No process was issued nor was the court asked to "enter any order requiring the said Erie & Western "Transportation Company to give security for the "claim set up in said cross-libel under general admir- "alty rule 53, nor does it appear that any copy of said "cross-libel was ever served or any proceeding what- "ever had under the same,"

and from the dismissal of the abandoned cross-libel, no appeal was taken, leaving the case in this respect as if that paper had never been filed.

The Dove, 93 U. S., 581.

Also (p. 4) occurs the statement of a conclusion that this court in its former consideration of this case (178 U. S. 317) "held" that petitioners remedy was by appeal and not by mandamus. The decision rendered was that the petition for mandamus must be dismissed as there was no disobedience of or departure from the mandate (178 U. S. 320).

The court said definitely

"no question of recouping one-half of such damages "to the cargo from the moiety of damages awarded "the Conemaugh was made by counsel or passed upon "by this court. * * * It is an entirely "new question, quite unaffected by the case of the New "York."

The decision of the Circuit Court of Appeals, of which complaint is now made, shows that the question of recoupment was not afterwards introduced.

CONTENTIONS OF PETITIONER.

The record discloses no assignment of errors, nor anything upon which to predicate argument, unless it be the question of *per centum* of interest, which is fully argued in brief of counsel for cargo. It is, therefore, significant, and should be controlling, that the argument presented on the question of recoupment is predicated solely upon the contentions put forward in the brief itself.

In other words, the matter of "recoupment," with the brief alone as its vehicle, again comes as a new and academic question, since by the holdings of the District Court, the Circuit Court of Appeals and of this court, it has never been presented as a question in this case.

We dispute the contentions of petitioner on the grounds:

1. If the right of recoupment were self-operative, inherent in the law without assertion of the right or any basis in pleading or issue, then the question must always have been in and inseparable from the case. The court (175 U. S., 187), decided against it; final decree in form sanctioned by this court (178 U. S., 317), was entered; a full term has since intervened and the question cannot be re-opened in this case.

2. If it was a new question open to consideration in the District Court, subsequent to the decision and mandate of this court, then there is nothing for review, because no pretense is made of thereafter presenting the question in the District Court by any proceeding or action of any character soever. There was a bare formal appeal from the decree entered without any intervening act.

When the question how to dispose of the claim for cargo damage came directly before this court (175 U. S., 209-210), it was held that while the damage to the steamers should be divided, the cargo interests must have a full decree against the New York alone as being alone impleaded for that damage, relegating the New York, as in the cited case of the Juniata, 93 U. S., 337, to an independent proceeding for contribution.

The case went back to the District Court not "for further proceedings in conformity with the opinion," as in the *Schooner Catherine v. Dickinson*, 17 How., 170-178, or "to adjust the loss on the principles stated in the opinion," as in the *James Gray*, 21 How., 184-185, but, in the language of the mandate, to *enter a decree* in conformity with the opinion of this court, and for execution "*in conformity with the opinion and decree of this court* (Rec. 23). The District Court thereupon proposed to enter decree dividing the damages of the steamers and against the New York alone for the cargo loss. Petitioner then came before this court for mandamus, contending precisely as it does now, that there is some magic in the doctrine of recoupment or counter-claim which makes it self-operative and binds every court to regard and enforce it as matter of law, irrespective of pleading or issue, notwithstanding the recognized election which the party has to claim it in the principal case or to prosecute an independent proceeding. This was distinctly denied by this court in refusing the peremptory writ, the court saying (178 U. S., 320):

> "It may be true that the decree holds the New "York liable for seventy-six per cent of the entire "damages and not fifty per cent, but this results from "the fact that she was primarily held for the entire "value of the cargo. The equal division applied only "to the vessels, and upon the other hand if petitioner "be entitled to the recoupment claimed, it would, "apparently, result in an affirmative decree in its favor. "But no question of recouping one-half of such dam- "ages to the cargo from the moiety of damages awarded "the Conemaugh was made by counsel or passed upon "by this court."

This would seem to dispose of the contention up to that time, and as a full term has elapsed since the mandate was executed and the decree, entered with the sanction of this court, became operative, there would seem to be an end of this case unless some fresh action, permissible in law and effective to bring in this new question, has supervened.

The only suggestion about recoupment now or ever made was through the form of decree presented by petitioner to the District Court as conforming to the requirements of the mandate. To enforce the entry of that decree the mandamus proceeding was instituted, and that and everything involved therein this court necessarily passed upon in the 178 U. S., 317, saying (p. 320),

> " if petitioner be entitled to the recoupment claimed, " it would, apparently, result in an affirmative decree in " its favor."

It is true that in dismissing the petition, the court said (178 U. S. 319):

> " The inferior court is justified in considering and
> " deciding any question left open by the mandate and
> " opinion of this court, and its decision upon such mat-
> " ter can only be reviewed upon a new appeal to the
> " proper court."

The only question upon which the District Court could exercise judgment or had right of decision in respect of the decree to be entered, was the *per centum* of interest.

But as to entering decree against the New York alone for the entire cargo damage, notwithstanding the fault of the Conemaugh, leaving the New York to whatever right of independent action for contribution she had, this court determined that, and never thereafter was any question on the subject presented to the District Court for action.

What the petitioner did after the decree was entered and approved was purely and simply and without any intervening act, matter or thing on its part, to take bare formal appeal from the action of the District Court in entering the decree, thereupon assigning as error that the District Court decreed against the New York for the full amount of cargo damage, instead of entering the suggested form of decree which had been brought before this court in the mandamus proceeding and rejected and characterized as one which would apparently result in an affirmative decree in favor of the New York, upon a subject matter which was entirely new to the case.

It will be convenient to reproduce here the salient portion of the opinion of the Circuit Court of Appeals (Rec. 46.) After quoting what this court said about the right of the inferior court to consider questions left open by the mandate, the Circuit Court of Appeals said:

> " For appellants it is contended that the question of
> " recoupment could not come on for decision until it was
> " determined that both vessels were at fault and until the cargo
> " owners and underwriters had recovered their full damages
> " from appellant, and that the District Court had, therefore,
> " when entering a decree under the mandate, the right to con-
> " sider and decide whether or not appellant had then the right
> " to recoup one half of the cargo damages it was thereby con-
> " demned to pay from the moiety of damages awarded the
> " Conemaugh; and that any error committed by the District
> " Court in denying or granting such recoupment may be
> " reviewed here. To this view of the abstract question we
> " are disposed to assent. But when and how was this matter
> " of recoupment presented to the District Court? The decree
> " which the court did enter was in precise conformity to the
> " mandate of the Supreme Court. The cargo underwriters

"having proceeded only against the New York, were entitled "to recover their full damages against it as the only vessel "impleaded.

"If the New York had availed itself of admiralty rule 59, "as was done in the case of *The Beaconsfield*, 158 U. S., 303, "307, and brought in the Comemaugh as a vessel in fault "which also ought to be proceeded against for cargo losses, "the question of the liability of that vessel to cargo under- "writers would have been presented and the cargo damages "would have been divided, if it had been found that that "vessel was also in fault for the collision and had no valid "special stipulations in her bills of lading relieving her from "liability to cargo underwriters.

"But this course was not taken. By neither cross-bill, "petition nor answer was this question of the Conemaugh's l "iability to cargo underwriters presented. Nor does it appear "that the question of recoupment, now raised by an assign- "ment of error upon the decree of the District Court, was "ever presented to that court by any form of pleading. "Since this case was heard, the appellant has applied for "leave to supplement the record by adding to it a decree "which they prepared and submitted to the District Court "as a decree in compliance with the mandate of the Supreme "Court, whereby the entire losses were equally divided between "the vessels. That proposed decree is the decree which the "Supreme Court refused to compel the District Court to "enter when appellant applied to it for a writ of mandamus. "In substance the insistence of the Union Steamboat Com- "pany was, that a decree should go against it for $19,841.56 "in favor of cargo underwriters, who had intervened for them- "selves, and a decree in favor of The Erie & Western Trans- "portation Company, as trustee for cargo underwriters rep- "resented by it, for $12,976.38. That result was reached in "this way:

"Libelant recovers of New York one-half of the damages sustained by the Conemaugh	$15,254.23	
"Recovers one-half of the amount sustained by it as bailee of the cargo	8,813.82	
		$24,068.06
"Less one-half of amount of intervenors' damages paid to cargo intervenors by New York	$ 8,920.78	
"Less one-half of amount of damages sustained by New York	2,170.90	
		11,091.68
		$12,976.38

"While this plan avoided the necessity for an affirm-
"ative decree in favor of the appellant without any pleading
"asking such relief, it did so at the expense of the under-
"writers represented by the appellee, whose claims aggre-
"gated $19,627.67, an amount exceeding the proposed decree
"in their favor by $6,651.29.

"This was clearly and distinctly inadmissible, as not
"conforming to the mandate of the Supreme Court, which
"directed that a decree should go against the New York for
"the whole of the cargo damages, as the only vessel im-
"pleaded by cargo owners or underwriters. Such a decree
"was not in accordance with the mandate, as the Supreme
"Court expressly decided. 178 U. S., 317. The equal division
"directed by that court applied only to the vessels. No
"question of recoupment having been presented or decided
"by the Supreme Court, it was not competent for that court
"to compel the District Court to enter a decree which was
"not required by its original decision. It is now sought to
"inject that proposed decree into this record as a basis for
"assigning as error the failure by the District Court to allow
"recoupment in some form. The decree never was a part of
"the record in the court below, and the fact that it was ever
"proposed as a decree in compliance with the mandate of the
"Supreme Court can only be shown by evidence *de hors* the
"record. No pleading or oral application for recoupment,
"other than may be inferred from it, was ever made to the
"court below. *It was submitted, not by way of an applica-*
"tion to the power of that court over a matter subsequent to
"the mandate and not concluded, but as a decree required by
"the mandate. If it were here we could not regard it as an
"application for recoupment to be granted or refused on its
"merits as a matter subsequent to the mandate, but as an
"application based upon a misconception of the mandate.
"The application for a writ of *certiorari* is refused.

"The right of set-off, or counter-claim, or recoupment,
"being in no way presented by any pleading in the case, was
"not so involved in the nature of the decree rendered as to
"make it error if the matter was passed *sub silentio.*

"It was not a defense which the appellant was obliged
"to then present. The mere fact that there are cross-demands
"will not operate as an estoppel if in fact the cross-demand was
"not presented and adjudicated.

"A set-off or counter-claim is generally admissible in
"equity only when the circumstances are such as to justify
"the interference of equity to prevent injustice or avoid
"circuity of action.

"Clearly it was not admissible to set off the decree in
"favor of the appellee as trustee for underwriters or cargo

"owners who had not intervened, by a claim against the "appellee in a wholly different right. *Manhattan Insurance* "*Co. v. McKown*, 33 C. C. A., 212.

"Neither are we aware of any authority which would "justify an affirmative decree upon a set-off in the absence "of some pleading seeking such affirmative relief. *The Dove*, "91 U. S., 381, 384; *Washington Rd. v. Bradley*, 10 Wall., "299; *The Ethel*, 66 F. R. 140.

"No issue having ever been made as to the liability of "the Conemaugh to her cargo underwriters, it would seem "altogether possible that an injustice might be done if it "should be summarily assumed, that because she was found "in fault and liable to the New York for one-half of her dam-"ages, that she is also liable to the underwriters upon her own "cargo. Counsel for the Conemaugh say that there are special "stipulations in her bills of lading which they [have right] to "set up against the claims of underwriters. Manifestly this "court should not foreclose this defense upon a record which "fails to show that any such right of set-off or recoupment "was ever claimed or asserted in the court below or that the "Conemaugh has ever been called upon to respond to the "claims of her cargo underwriters. Not having been passed "upon in the court of original jurisdiction, this court is not "disposed to hold that the lower court erred in passing the "matter over. *Harding v. Giddings*, 19 C. C. A., 508. *Lloyd* "*v. Preston*, 146 U. S., 630. Neither do we think that inno-"cent third parties should be longer delayed in the collection "of cargo damages, by the delay incident to sending this "case back for the purpose of allowing such pleadings as "would properly present the question. The appellants not "being obliged to assert their cross-demand or claim for con-"tribution by way of recoupment in this cause did not do so. "This leaves them free to assert their claim for contribution in "an independent proceeding against the Conemaugh. No "special equity appearing, this will be no injustice. The "motion to remand with leave to amend the pleadings is, "therefore, denied."

Petitioner presents here the same argument with the same authorities as it presented to this court in the mandamus proceeding in an effort there to establish the proposition of some inherent, self-enforcing quality of the doctrine of recoupment, which would compel a court as matter of law, regardless of pleadings and oblivious to the just rights of the party sought to be charged, to somehow conserve the interest of a condemned *tort feasor* to the extent, if necessary, of giving affirmative decree against one who has never been impleaded or had opportunity of defending.

Each of the three courts, before which this case has been

more than once, has denied the doctrine. This court had previously denied it in *The Juniata*, 93 U. S., 337, and explained the grounds of such denial in *The Beaconsfield*, 158 U. S., 303, and in the explicit determination of the question (175 U. S., 209-210) when this case was first here.

The mandate directed the entry of decree in conformity with the opinion, for execution in conformity with the opinion and decree of this court (Rec. 23). The stereotyped phrase of the mandate, "as according to right and justice and the laws of the United States ought to be had," did not authorize the District Court to "depart in any respect from the judgment of this court."

In re Railroad Company, 140 U. S., 91.
Gaines v. Rugg, 148 U. S., 228-243.

The District Court could not revise or reconsider in any respect the decision, and was entirely without authority to admit "new matter" had such been proffered, without leave of this court.

In re Potts, 166 U. S., 263.

This was an admiralty cause, brought to this court on writ of certiorari and treated as if on appeal; all questions presented in the case were here decided, and the decree entered in pursuance of the mandate was the decree of this court.

Stewart v. Salamon, 97 U. S., 361.
Humphrey v. Baker, 103 U. S., 736.
Southard v. Russell, 16 How., 547-570.

There was no power in the District Court to allow new pleading, amendments or rehearing, and silence upon any point involved in the case would have to be taken as a denial of the point.

In re Railroad Company, 140 U. S., 91.
Texas, &c., Ry. Co. v. Anderson, 149 U. S., 237.

The mandate directed that the decree include interest at the same rate per annum that decrees bear in the courts of the State of Michigan. This may be regarded as investing the District Court with the function of judging and deciding upon that rate, and may be such new matter as could become the subject of appeal in accordance with the intimation of the court in its opinion which accompanied the denial of the application for mandamus; but petitioner was foreclosed of any right of further complaint in this suit.

> " No rule is better settled than that an appeal
> " from a decree entered by the court below in accord-
> " ance with the mandate of the appellate court cannot
> " be maintained."
>
> *Aspin, etc. Co. vs. Billings*, 150 U. S., 31-37.

It seems to us that here is an end of the matter, and our presentation of the case for the Erie & Western Transportation Company should close, but for the fact that in

Hubbard vs. Tod, 171 U. S., 474-494,

this court regarded the contentions of petitioner's brief as assignments of error. It is perhaps due that we should follow somewhat the authorities and argument of the brief.

The libel in this case presented two distinct claims. The Erie & Western Transportation Company was owner of the propeller Conemaugh, and had in its custody as carrier a miscellaneous cargo. Following the settled practice, it sued for the entire damage, setting up distinctly that it claimed for the loss and damage to the steamer in its own right as owner, but as to the loss and damage to the cargo, it stood as bailee and trustee for the cargo owners and underwriters. All the cargo was insured.

Afterwards some of the cargo underwriters intervened without seeking to affect in any manner the issues or the status of the claim. They achieved by intervention no more than the right to urge in their own behalf the right which had been set up by the Erie & Western Transportation Company as trustee.

The right of the ship owner to so proceed is well established, and the right involved is precisely the same as if prosecuted directly by the cargo interest. This court has settled the bailee's right to recover the entire cargo damage in a case where by reason of his own fault he recovers only a moiety of the damage to his ship.

The Beaconsfield, 158 U. S., 303 at 307.

It seems idle to pursue this here since the court in dealing with the character of decree called for by its opinion and mandate, said,

> "It may be true that the decree holds the New York "liable for seventy-six per cent of the entire damages "and not fifty per cent, but this results from the fact "that she was primarily held for the entire value of the "cargo. The equal division applied only to the "vessels."
>
> *Ex-Parte The Union Steamboat Co.*, 178 U. S., 317-320."

The contention now brought forward is that a party may keep a matter out of the suit, as if to present it in an independent action should occasion require, and then after the suit has gone against him under a decision that the matter is not involved but is an entirely new question, may by a bare appeal from the decree entered in approved conformity with the man-

date, bring in this new question by a simple assignment of error to the entering of the approved decree.

Petitioner might possibly, under the ruling in the *North Star*, 106 U. S., 17-27, have made claim of recoupment in its answer or perhaps by cross-libel. Clearly it might have done it under rule 59 without prejudice to its own defense, and according to the decision of this court in *The Beaconsfield*, 158 U. S., 303, that would have been the correct practice.

Speaking of its opinion, this court said (178 U. S., 320):

> "The only questions decided were as to the "respective faults of the two vessels, and the claim of "the underwriters upon the Conemaugh's cargo, that "they were entitled to a recovery to the full amount of "their damages against the New York, notwithstanding "the Conemaugh was also in fault for the collision. "This claim was sustained, and directions given to "enter a decree in conformity to the opinion of this "court. Such decree was entered, dividing the dam- "ages between the two vessels, and awarding to the "underwriters of the cargo a full recovery against the "New York. It may be true that the decree holds the "New York liable for seventy-six per cent of the entire "damages and not fifty per cent, but this results from "the fact that she was primarily held for the entire "value of the cargo. The equal division applied only "to the vessels, and upon the other hand if petitioner be "entitled to the recoupment claimed, it would, appar- "ently, result in an affirmative decree in its favor. But "no question of recouping one-half of such damages to "the cargo from the moiety of damages awarded the "Conemaugh was made by counsel or passed upon by "this court."

After entry of the decree, petitioner, without attempting to bring the matter in any manner or form before the District Court, appealed to the Circuit Court of Appeals for the Sixth Circuit, and as its third assignment of error (Rec. 27) proposed,

> "that the court erred in not permitting the Union "Steamboat Company to offset or recoup any part of "the damages paid on account of loss or the damage to "the cargo of the steamer Conemaugh, against the "claim for damages sustained by the libellant as owner "of the steamer Conemaugh."

But the same difficulty recurs. Just as this court had said that no question of recouping one-half or any part of cargo damage was made by counsel here, whatever legal machinery it might have been permissible to resort to after determination here, nothing was attempted, and the Circuit Court

of Appeals, as already quoted, justly said that the question was not afterwards raised in the case.

So far as recoupment is a right and obtains, it is a definite right, subject to proper limitations. A party is not compelled to resort to it; it is optional whether he assert the right in the orignal suit. Where in case of collision one vessel is libeled, it is optional with the owner of the other vessel to file his counter-claim by way of cross-libel or to bring an independent action. This was determined by this court in *The Juniata*, 93 U. S., 337, and followed in the present case, 175 U. S., 187.

It is true that before the promulgation of Admiralty Rule 59, there was no definite rule which enabled parties to bring before the court all necessary parties, although Judge Addison Brown did not hesitate to decide that on proper application this would be done.

The Hudson, 15 Fed., 162.

Other courts, as in cases cited by petitioner, seem to have undertaken to work out the rights of parties under some notion of "rustic justice." The necessity for resorting to such latent powers of the court, whether by bringing in the parties or working out the equities otherwise, was removed by the adoption of rule 59. This put an end to the right of inferior courts, under authority of the 46th rule, to regulate their own modes of procedure in such cases.

The only case we are aware of in which the precise question has been considered in this court is the *Beaconsfield*, which we think definitely recognizes the force of the 59th rule.

The court said, p. 307 [158 U. S.]:

> "and in case he (the cargo owner) proceed against one "only, and both are held in fault, he may recover his "entire damages of the one sued. A person, who has "suffered injury by the joint action of two or more "wrongdoers, may have his remedy against all or either, "subject, however, to the condition that satisfaction "once obtained is a bar to any further proceeding. "The Atlas, 93 U. S., 302, 315; Lovejoy vs. Murray, 3 "Wall., 1. Did the case rest here, there could be no "doubt of the right of the libelant to recover the "whole damage to the cargo of the Britannia, although, "as owner of the Beaconsfield herself, Cleugh could "recover only a moiety of his damage to the vessel, "in case the collision were adjudged to be the mutual "fault of both vessels."

Then, considering rule 59, which was complied with in that case, to predicate the right of recoupment, the court says (309):

> "Had no petition been filed against the Beaconsfield

" by the French company, the case would have stood
" quite differently, and there would have been no suit
" against the Beaconsfield upon which a decree could
" have been rendered."

The decree of this court in the present case stands upon the same principle. After quoting (175 U. S. 210) from *The Atlas*, language supporting the proposition that a plaintiff suffering loss by the negligence of two parties, is at liberty to sue both or either, and if without fault is entitled to judgment in either case for the full amount, the court quotes further from the same case:

" Co-wrongdoers, not parties to the suit, cannot be
" decreed to pay any portion of the damage adjudged
" to the libelant, nor is it a question in this case
" whether the party served may have process to
" compel the other wrongdoers to appear and respond
" to the alleged wrongful act."

The court also referred to

The Juniata, 93 U. S., 337.

There Pursglove filed his libel against the Juniata for damage to his tug and for personal injuries; the United States also libeled the Juniata. Both the Juniata and the tug were held in fault. Pursglove recovered half his damages, property and personal, against the Juniata; the United States being without fault recovered full damages against the Juniata. Although Pursglove was before the court suing and had decree against the Juniata, yet, as neither he nor his tug had been made a party to the claim of the United States, this court there required the claimants of the Juniata to pay the full damage to the United States, and on the question of claimants' right to recoup or have such relief as petitioner is here seeking, said (340):

" Whatever their rights may be against Pursglove,
" by reason of such payment of more than one-half,
" must be settled in another proceeding. It cannot be
" done in this litigation."

Besides some cases in the lower courts in which the equities were worked out before the rule was adopted, and which will be briefly considered later, petitioner refers to

The North Star, 106 U. S., 17.
The Manitoba, 122 U. S., 97.
The Chattahoochee, 173 U. S., 540.
The Albert Dumois, 177 U. S., 240.

In each the party against whom recoupment would operate invoked the protection of a public statute, and thereby, by operation of law, made himself and any reclamation claim arising from the disaster *party defendant* as to all the damages, or as to the particular claim, with fullest opportunity to

present defense, so that the resulting decree should be conclusive upon all parties, a final and complete adjudication of all liability.

Referring, however, to the cases specifically. The question in the *North Star* was, When can a party thus invoking the benefit of the act have it applied to his liability, before or after that liability is adjusted upon such full consideration of the particular facts in the case as shall enable the court to fix the *ultimate* liability of the party? It was not necessary to consider any such question as we have in this case, because by his own act in invoking the aid of the statute, the party had brought into the case every issue, the determination of which was necessary to the ascertainment of such ultimate liability.

In the *North Star* case there was no question of cargo damage. This came up for consideration in the case of the *Manitoba*, but aside from the consideration above stated, such a question as we have here could not arise. The *Manitoba*, was held liable for one-half of the total damage. There was no occasion for any recoupment, because the bond given on her release in the limited liability proceeding was less than a *moiety* of the damages in the case, and a decree was rendered for the amount of the bond.

The case of the *Chattahoochee* is a similar authority. The precise manner in which the question was brought before the District Court does not appear, but it does appear that in the course of the proceedings in the District Court the libelant himself at some stage of the trial and before final decree presented to that court for adjudication a question, the elements of which are these:

Both vessels are found in fault; here is cargo damage as well as damage to the schooner; under the general law, the schooner would be held to pay one-half the cargo damage, which, the schooner having been lost, might be deducted from the recovery for her own damage; but the Harter act exonerates the carrying vessel from this liability, and the cargo owner must forego this *moiety* of his loss unless, perhaps, the steamer should pay the whole. The limited liability act was also referred to.

An essential point differentiates the cases from the present one, since in each there was of necessity presented every question and every element of every question necessary to the full and final disposition of all the rights, affirmative and defensive, between the cargo owner and the owners of both ships in such manner that the decision of the court thereupon must be final and conclusive. In what particular manner they were thus presented is immaterial to any question that he might raise on the subject. Therefore, as in the other cases, includ-

ing *The Albert Dumois*, 177 U. S., 240, we find no consideration of the question raised here.

When a party has thus had his day in court upon the question of the cargo claim and its effect upon him, he cannot be heard to complain if the trial court decides upon this as an element of the case presented. The very thing was present in each case which we assert is necessary before a person's property may be taken to pay a claim, to wit: that the party to be charged be given an opportunity to present any defense he may have to that claim.

Before a party can have the benefit of limitation of liability, any fund arising from the loss of or damage to the ship must be surrendered.

O'Brien v. Miller, 168 U. S., 287-306.

Of the earlier cases cited in petitioner's brief, perhaps the strongest is

The Eleanora, 17 Blatch., 88, F. C. 4335,

where two separate libels were filed, one for the vessel, the other for the cargo; both vessels were held at fault and the court without much consideration seems to have gone on the impression that if the claim for the cargo damage and for damage to the carrying vessel were presented in the same libel, they became amalgamated into one claim, subject to the same limitations, a doctrine destroyed by this court in the *Beaconsfield*, 158 U. S., 303.

In *The C. H. Foster*. 1 Fed., 733, in which limitation of liability was also involved, the cargo damage was ordered paid into court first, and then, a decree entered which should show that one-half that sum was included in the damage of the ship paying, with leave to amend the libel setting up that damage if the parties thought desirable.

In *The Hercules*, 20 Fed., 205, Judge Lowell said (206):

> "It is true that the question whether the schooner is "excused from liability to the owners of the cargo "shipped on board of her, has not been brought into "the case; and therefore, if there is any ground for "relieving the owners of this liability, they may show "it by supplementary proceedings in the cause."

Treating these cases in a group. They were made before the promulgation of rule 59; later ones are on the authority of these without consideration. The various means adopted were employed in the interests of justice, guarding in some manner against condemning a party without hearing. Each court was at liberty to work out its own procedure in this respect under rule 46.

It was doubtless to correct this deficiency in the admiralty procedure and to avoid the haphazard disposition of this kind

of questions that the rule was adopted, furnishing a standard of practice and procedure competent to bring the question in an orderly way before the court. Rule 46 as well as section 918, Rev. St., provides that the Circuit and District Courts have power to regulate their practice and procedure only in those respects in which it is not controlled and regulated by statute or rule of the Supreme Court. The necessary result of this is that where the Supreme Court does by rule establish a definite procedure, any other is excluded. The rules

> "are little more than a recognition and formulation of "the previous practice of courts of admiralty in this "country and in England. They have come before "this court in several instances, and have always been "treated as obligatory."
>
> *The Corsair*, 145 U. S., 335, 342.

Where the rules prescribe a course it is exclusive of any other.

> *The Illinois*, Brown's Adm., 13; F. C. No. 7003.

We can only understand the expressions of the court in *The Beaconsfield* as supporting this doctrine. In that case the claim was by the owner of the carrying ship for damage to the ship in his own right and as trustee for the cargo owners. The original claimant of the ship proceeded against filed a petition in conformity with Rule 59 to bring in the libelant's vessel, the *Beaconsfield*, as a defendant to the claim asserted as trustee for the cargo owner. In this connection the court said, p. 309:

> "When the Beaconsfield was drawn into the liti- "gation by the petition of the French company, and "his own vessel thus made to respond to his libel, "Cotton should have either withdrawn from the suit, "and asked that Sanbern be substituted, or in his "answer to the petition of the French company should "at least have set up any defense he might have had "against the owner of the cargo, arising under the bill "of lading or from any other cause. If the attention "of the court had then been drawn to the fact that "Cotton was occupying inconsistent positions, it would "doubtless have ordered the owner of the cargo to be "substituted for him as libelant. Had no petition been "filed against the Beaconsfield by the French company, "the case would have stood quite differently, as there "would have been no suit against the Beaconsfield "upon which a decree could have been rendered."

This is the present case; no petition was filed, and libelant recovers full damages for its *cestuis que trust*, underwriters on cargo, but by reason of its fault, only a *moiety* of its own damage. There is no suit against the Conemaugh or her

owner in which a decree can be rendered. If the appellant, as claimant of the New York, has any claim against the Conemaugh or her owner, by reason of her payment of cargo damage, having failed to put the matter in form for determination in this proceeding it must be relegated to an independent proceeding, as in *The Juniata*, 93 U. S., 337.

Petitioner's contention that it is not necessary that the record show that recoupment was demanded in the District Court in any manner, because the trial in the "Circuit Court" is *de novo*, so that a simple demand in argument in the Circuit Court of Appeals should be acted upon and granted as of course, begs the question.

After the Circuit Court of Appeals had in turn decided that up to the time of its decision the question of recoupment had never in any manner been brought properly into this case, the petitioner made some sort of application to remand the case with leave to amend. What it was cannot be stated, as no particulars of the proposed amendment seem to have been submitted. It can only be gathered from what the court said (Rec. 48):

> "No issue having ever been made as to the liabil-
> "ity of the Conemaugh to her cargo underwriters, it
> "would seem altogether possible that an injustice might
> "be done if it should be summarily assumed, that
> "because she was found in fault and liable to the New
> "York for one-half of her damages, that she is also
> "liable to the underwriters upon her own cargo. Coun-
> "sel for the Conemaugh say that there are special stipu-
> "lations in her bills of lading which they [have right] to
> "set up against the claims of the underwriters. Man-
> "ifestly this court should not foreclose this defense
> "upon a record which fails to show that any such right
> "of set-off or recoupment was ever claimed or asserted
> "in the court below or that the Conemaugh has ever
> "been called upon to respond to the claims of her
> "cargo underwriters. Not having been passed upon
> "in the court of original jurisdiction, this court is not
> "disposed to hold that the lower court erred in passing
> "the matter over. *Harding v. Giddings*, 19 C. C. A.,
> "508. *Lloyd v. Preston*, 146 U. S., 630. Neither do
> "we think that innocent third parties should be longer
> "delayed in the collection of cargo damages, by the
> "delay incident to sending this case back for the pur-
> "pose of allowing such pleadings as would properly
> "present the question. The appellants not being
> "obliged to assert their cross-demand or claim for
> "contribution by way of recoupment in this cause did
> "not do so. This leaves them free to assert their

"claim for contribution in an independent proceeding
"against the Conemaugh. No special equity appear-
"ing, this will be no injustice. The motion to remand
"with leave to amend the pleadings is, therefore,
"denied."

The Circuit Court of Appeals under the principle of trial *de novo* has no right to go outside of the record and try some other case on issues which had never been presented in any court.

If we should grant for the purpose of argument, right to file new pleadings or make amendments and bring in new issues, the right is not an open one and must be subject to reasonable discretion and control by the court. Clearly a court should exercise such a power sparingly and with true discretion to prevent injustice.

The case of *Gilchrist v. Chicago Ins. Co.*, 104 Fed., 566, goes as far in the matter of trial *de novo* as any of the cases, but the utmost there suggested by Justice Harlan limits the holding to issues made in the pleadings, the Honorable Justice saying (571):

"This court may properly consider and determine every
"issue raised by the pleadings, and, without regard to
"the decree below, direct such a decree to be entered
"here as is consistent with law."

We respectfully submit that the decree entered by the District Court in conformity with the mandate as sanctioned and confirmed by this court in 178 U. S., 317, and in respect of which no new matter has been presented since, should be affirmed.

HARVEY D. GOULDER,
Proctor for Erie & Western
Transportation Company.

S. H. HOLDING,
F. S. MASTEN,
Counsel.

No. 97.

FILED
OCT 6 19
JAMES H. McKENNEY

Supreme Court of the United States.

Motion for leave to intervene

THE UNION STEAMBOAT COMPANY, Claimant of the propeller "NEW YORK," Petitioner,

AGAINST

THE ERIE AND WESTERN TRANSPORTATION COMPANY and others.

Filed Oct. 6, 1902.

No. 97.
October Term, 1902.

2

Upon the annexed petition and consent, and upon all proceedings herein, I shall make a motion before the Supreme Court of the United States in Washington on the second Monday of October, 1902, to wit, October 13th, at the opening of the court upon that day, or as soon thereafter as counsel can be heard, for leave to the Mannheim Insurance Company, the Firemen's Fund Insurance Company of San Francisco, the London Assurance Corporation and the British and Foreign Marine Insurance Company, Limited, to intervene herein in respect of their respective interests in the moneys heretofore decreed to the Erie and Western Transportation Company, as Trustee for owners and underwriters of cargo, and to appear by their proctor.

3

New York, September 25, 1902.

WILHELM MYNDERSE,
Proctor for Mannheim Insurance Company and others.

To HARVEY D. GOULDER, Esq.,
Proctor for Erie and Western Transportation Co.

FRANK H. CANFIELD,
Proctor for Erie and Western Transportation Co., as Trustee.

C. E. KREMER,
Proctor for Union Steamboat Co.

SUPREME COURT OF THE UNITED STATES.

THE UNION STEAMBOAT COMPANY, Claimant of the Propeller "NEW YORK,"
Petitioner,

AGAINST

THE ERIE AND WESTERN TRANSPORTATION COMPANY and others.

No. 97.
October Term, 1902.

The petition of the MANNHEIM INSURANCE COMPANY, the FIREMEN'S FUND INSURANCE COMPANY OF SAN FRANCISCO, the LONDON ASSURANCE CORPORATION, and the BRITISH AND FOREIGN MARINE INSURANCE COMPANY, LIMITED, sets forth as follows:

On October 21, 1891, the steamer *Conemaugh*, bound on a voyage from Milwaukee, Wisconsin, to Erie, Pennsylvania, with a cargo of about 1,800 tons of package freight, consisting chiefly of flour, bran, white lead and oil cake, came into collision with the steamer *New York*. By the collision the *Conemaugh* and her cargo sustained serious injuries.

Thereafter, on November 11, 1891, the owners of the *Conemaugh* filed a libel against the *New York* in the District Court of the United States for the Eastern District of Michigan, claiming damages in the amount of ten thousand dollars for salvage expenses, twenty thousand dollars for injuries to the hull of the *Conemaugh*, ten thousand dollars for loss of use of the *Conemaugh*, and thirty thousand dollars for damage to the cargo of the *Conemaugh*, and prayed recovery for the damages sustained by it as owner of the *Conemaugh*, and also as trustee for the owners of her cargo (Libel, Art. 6, p. 5).

The petitioners, the Mannhein Insurance Company, the Firemen's Fund Insurance Company of San Francisco,

the London Assurance Corporation, and the British and 7
Foreign Marine Insurance Company, Limited, respectively, had made insurance upon certain lots of said cargo for the benefit of the owners thereof, and by reason of the collision and the consequent damage to the said cargo have been compelled to pay and have paid to the said owners losses for which the suit has been prosecuted by the said Erie and Western Transportation Company, as trustee.

Other lots of cargo were otherwise insured, and the underwriters thereon, as the petitioners are informed and believe, have heretofore intervened in said cause with the effect that they made specific recoveries in respect of their losses.

In due course the action came into this court with the result that in February, 1900, this Court issued its man- 8
date to the District Court of the United States for the Eastern District of Michigan, to reverse the then existing decree and to enter a new decree based upon the fault of the two steamers.

Thereupon, on March 24, 1900, the said District Court entered a decree under said mandate, whereby, among other things, it provided that the said Erie and Western Transportation Company should recover the sum of nineteen thousand six hundred and twenty-seven dollars and sixty-one cents ($19,627.61), with interest thereon from July 3, 1896, "in trust for the owners and underwriters of cargo."

The petitioner shows that the owners of the said cargo have been fully paid their losses by the petitioners respect- 9
ively, and that said recovery, made as aforesaid by the said Erie and Western Transportation Co., in trust, is due to the petitioners according to their respective interests.

Wherefore, the petitioners pray leave to intervene for their respective interests, and to appear in the action to the end that the amount due each of them may be specifically decreed to them.

WILHELMUS MYNDERSE,
Proctor for Petitioners,
54 Wall Street,
Borough of Manhattan,
City of New York.

City of New York, }
Southern District of New York, } ss.:

Franz Herrmann, being duly sworn, says: That he is Manager in the City of New York of the Mannheim Insurance Company; that he has read the foregoing petition and knows the contents thereof, and that the same is true according to his best knowledge, information and belief; that said Mannheim Insurance Company is a corporation organized and existing under and pursuant to the laws of the Empire of Germany; that none of its executive officers reside within or now are in this country; wherefore this verification is made by deponent.

Franz Herrmann.

Sworn to before me this 25th day of September, 1902.

Chas. Flynn,
Notary Public,
N. Y. Co.

[seal.]

SUPREME COURT OF THE UNITED STATES.

Union Steamboat Company, claimant of the Propeller "New York,"
Petitioner,
against
Erie and Western Transportation Company and Others.

No. 97.

It is hereby consented that the Mannheim Insurance Company, the London Assurance Corporation, the British and Foreign Marine Insurance Company, Limited, and the Fireman's Fund Insurance Company of San Francisco, underwriters of cargo on the steamer *Conemaugh*, intervene and appear herein by Wilhelmus Mynderse, their

proctor, for their respective interests in the amount of $19,627.67 awarded to the "Erie and Western Transportation Company, Trustee for Owners of cargo and Underwriters," under the decree of the District Court of the United States for the Eastern District of Michigan, now under review by *certiorari;* and that any appropriate order be entered accordingly hereon. 13

Dated September 8, 1902.

C. E. KREMER,
Proctor for Petitioner.

HARVEY D. GOULDER,
Proctor for Erie and Western Transportation Company.

F. H. CANFIELD, 14
Proctor for Erie and Western Transportation Company, as Trustee.

WILHELMUS MYNDERSE,
Proctor for Underwriters.

No. 97.

Bef. of Mynde

Filed

Supreme Cour

Octo

THE UNION STEAMBOAT

THE ERIE AND WESTER

OWNER OF STEAMBOAT

THE MANNHEIM INS

Brief fo

WILHELMUS MYNDERSE,

Advocate

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Office Supreme Court U.S.
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Clerk.

...derse for [illegible]
et al. intervenors in
Oct. 28, 1902.

...urt of the United States.

No. 97.
...ctober Term, 1902.

...AT COMPANY, CLAIMANT OF THE STEAMBOAT NEW YORK,

Petitioner,

vs.

...ERN TRANSPORTATION COMPANY, AS ...AT CONEMAUGH, AND AS TRUSTEE, &c.,

Libellant,

and

...INSURANCE COMPANY AND OTHERS,

Intervenors.

...for Intervenors.

...ate.

1348

Supreme Court of the United States.

THE UNION STEAMBOAT COMPANY, Claimant of the steamboat NEW YORK, *Petitioner*, vs. THE ERIE AND WESTERN TRANSPORTATION COMPANY, as Owner of the steamboat CONEMAUGH, and as Trustee, &c., *Libellant*, and THE MANNHEIM INSURANCE COMPANY, and others, *Intervenors*.	No. 97. October Term, 1902.

BRIEF FOR INTERVENORS.

This action arose out of a collision between the steamers *Conemaugh* and *New York*, occurring October 21, 1891.

At the time of the collision the *Conemaugh* was bound from Milwaukee, Wisconsin, to Erie, Pennsylvania, with a cargo of about 1,800 tons of package freight, consisting principally of flour, bran, oilcake and pig lead (*Libel, Art. 2, p. 3*). The *New York* was bound from Buffalo, New York, to Milwaukee, Wisconsin (*Answer, Art. 4, p. 7*).

The side of the *Conemaugh* was crushed by the collision and in consequence thereof, she sank with her cargo (*Libel, Art. 3, p. 4*). She was subsequently raised, but both she and her cargo were seriously damaged (*Libel, Art. 5, p. 5*).

The Erie and Western Transportation Co., owner of the *Conemaugh*, filed a libel in the District Court of the United States for the Eastern District of Michigan, November 11, 1891, three weeks after the collision, asserting damages in the amount of $10,000 as the estimated expense of raising the *Conemaugh* and her cargo, in the amount of $20,000 as the estimated cost of repairs to the *Conemaugh*, in the amount of $10,000 as the value of the probable earnings of the *Conemaugh* during the period of repairs, and in the amount of $30,000 as the estimated damage to the cargo (*Libel, Art. 5, p. 5*).

The libel then summarized the claims as follows:

> "On account of said collision the aggregate amount of "damage here sued for and sustained by the libellant as "the owner of the said propeller *Conemaugh* and also as "trustee for the owners of the said cargo, is, as near as "the same can be ascertained, the full sum of seventy "thousand dollars ($70,000)" (*Libel, Art. 6, p. 5*).

Thereafter the Insurance Company of America, the British and Foreign Marine Insurance Company (Lim.), the Union Marine Insurance Company, and the Marine Insurance Company (Lim.), underwriters upon cargo of the *Conemaugh* intervened in respect of their interests in the claim which had been put forward by the owners of the *Conemaugh* as trustee. (*Stipulation, pp. 23-24, Decree, pp. 24-25*).

The petition of the Insurance Company of North America for leave to intervene was filed October 8, 1894 (*Petition, pp. 15-19*).

The record does not indicate the dates upon which the other underwriters intervened.

The answer of the claimant of the *New York* alleged that she had "sustained damages to her stem and other parts of her forward" (*Answer, Art. 6, p. 8*), but did not measure the amount.

A cross-libel filed upon the hearing of the cause in the District Court declared the damages of the *New York* to be $3,000 (*Cross Libel, Art. 4, p. 11*), and these dam-

ages were afterwards more accurately measured by stipulation in the amount of $4,841.80, "including interest to July 3,1896." (*Stipulation, pp. 23–24*).

The District Judge after the original hearing of the cause filed an opinion holding both vessels in fault.

The New York, 58 Fed. Rep., 553.

Upon a motion for a rehearing he so far modified his first decision as to hold the *New York* solely in fault (*Record, pp. 13–15*), and a decree of the District Court was entered accordingly.

Upon appeal this decree was reversed by the United States Circuit Court of Appeals in an opinion holding that the *Conemaugh* was solely in fault.

The New York, 82 Fed. Rep., 819.

The mandate of the United States Circuit Court of Appeals issued accordingly (*Mandate, p. 21*); but its operation was stayed by a writ of *certiorari* issued out of this Court.

Upon the hearing of the cause in this Court on the writ of *certiorari* both vessels were held in fault.

The New York, 175 U. S., 187.

The mandate of this Court issued accordingly to the District Court of the United States for the Eastern District of Michigan under date January 22, 1900.

Mandate, pp. 22, 23.

The material portions of the judgment and mandate of this Court were:

"On consideration whereof, it is now ordered, adjudged "and decreed by this Court that the decree of the said "United States Circuit Court of Appeals in the cause be "and the same is hereby reversed; the claimant of the "*Conemaugh* and the claimant of the *New York*, each to "pay one-half of all costs in this cause.

"And that the said Erie & Western Transportation "Company recover against the Union Steamboat Com-"pany $276.75 for one-half of the costs herein expended, "and have execution therefor.

"And it is further ordered that this cause be and the "same is hereby remanded to the District Court of the

" United States for the Eastern District of Michigan, with " direction to enter a decree in conformity with the " opinion of this Court, with interest from July 3, 1896, " until paid, at the same rate per annum that decrees bear " in the courts of the State of Michigan " (*Mandate, pp. 22, 23*).

Thereupon the District Court made its further decree, which is now under review by this Court (*Decree, pp. 24, 25*).

It first gave judgment in favor of the several intervening underwriters upon cargo for their respective claims, with interest at seven per cent., from July 3, 1896.

Those judgments have been paid by the petitioner (*3 Assignment of Error, p. 27*).

The decree then provided as follows:

" And it further appearing that the owners of said cargo " and their underwriters, other than the intervenors, " have suffered damage by said collision in the sum of " $19,627.67, for which the said Erie & Western Trans- " portation Company appears in this suit as trustee only, " it is further ordered, adjudged and decreed, that said " trustee recover from the said Union Steamboat Com- " pany and its surety, in trust, for the said owners of and " underwriters on cargo, the aforesaid sum of $19,627.67, " with interest thereon at the rate of seven per cent. per " annum, from July 3, 1896, until paid, and that it have " execution therefor."

It next gave judgment in favor of the owner of the *Conemaugh* for one-half of the damages of that steamer, less one-half of the damages of the *New York*, with interest.

Finally it adjudged costs (*Decree, pp. 24. 25*).

The claimant of the *New York* then applied to this Court for a writ of mandamus directing the District Judge to cure certain alleged errors in the decree.

This application was denied by this Court with a suggestion that the decree could be reviewed only by appeal and not under a petition for mandamus.

Ex parte Union Steamboat Co., 178 U. S., 317.

The claimant of the *New York* thereupon filed assignments of error to this decree (*Assignments of Error, pp. 26, 27*), and prayed an appeal to the United States Court of Appeals (*Appeal, p. 26*).

Upon the hearing of the appeal, the United States Court of Appeals filed an opinion that a trifling error in the apportionment of costs should be corrected, and that otherwise the decree of the District should be affirmed (*Opinion, pp. 43-52*).

Before any further steps were taken in the United States Circuit Court of Appeals, a writ of *certiorari* issued out of this Court, by which all proceedings then in the United States Circuit Court of Appeals were brought here for review (*Writ of Certiorari, p. 52*).

POINTS.

First.

THE ONLY PROCEEDINGS NOW UNDER REVIEW ARE THOSE TAKEN UNDER THE MANDATE ISSUED OUT OF THIS COURT, JANUARY 22, 1900.

The questions before the Court are

First—Whether the decree entered by the District Court was in conformity with the mandate of this Court; and

Second—Whether any errors in such decree were duly brought before the United States Circuit Court of Appeals for review; and

Third—Whether the United States Circuit Court of Appeals erred in its disposition of the questions so brought before it.

The present proceeding is akin to an appeal taken to this Court under the old practice from a decree entered by an inferior court upon the mandate of this Court.

Such an appeal brought before this Court for review only the action of the lower Courts since the issuing of the mandate.

Ex parte Sibbald vs. *United States*, 12 Peters, 488, 492.
The Lady Pike, 96 U. S., 461.
The Nuestra Senora de Regla, 108 U. S., 101.
Kreiger Shelby Ry. Co., 125 U. S., 39.
Egan vs. *Hart*, 165 U. S., 188.
Thompson vs. *Maxwell*, 168 U. S., 451, 456.
Ex parte Union Steamboat Co., 178 U. S., 317, 320.

All questions relating to the navigation of the two vessels and to their respective faults, and to the rights of the cargo underwriters to a full recovery of their damages against the *New York* were settled forever by the former decision of this Court, reported in *The New York*, 175 U. S., 187.

The question of the right of the cargo to recover its full loss from the *New York* was settled by that decision.

That decision declared and determined the law of the case upon all questions then before the Court.

Second.

SO FAR AS THE CARGO INTERESTS ARE CONCERNED THE DECREE OF THE DISTRICT COURT GIVING THEM A FULL RECOVERY AGAINST THE NEW YORK, WITHOUT DIMINISHMENT THROUGH RECOUPMENT, IS IN FULL ACCORD WITH THE MANDATE.

A. The mandate, so far as the award of damages was concerned, directed the District Court "to enter a decree in conformity with "the opinion of this Court."

(*Mandate, p. 23.*)

The opinion of the Court, to which such reference is made in the mandate, held both the *Conemaugh* and the *New York* in fault, and that therefore their damages must be divided.

Further it held, in respect of the cargo:

"The final question arises upon the insistence of the "underwriters of the *Conemaugh's* cargo, that they are "entitled to a recovery to the full amount of their dam- "ages against the *New York*, notwithstanding the *Cone-* "*maugh* may also be in fault for the collision. They are "correct in this contention. Indeed, this Court has al- "ready so decided in the case of *The Atlas*, 93 U. S., 302, "315, 317. This was a libel against the *Atlas* by an insurer "of the cargo of a canal boat in tow of the steam tug *Kate*, "whereby the canal boat and her cargo were lost. It was "insisted by the claimant that, as the libellant had failed "to make the *Kate* a party, and as both vessels were found "to be in fault for the collision, there could be a recovery "of only a moiety of the damages. The case of *The Milan*, "Lush., 388, was confidently relied upon as an authority. "This court, however, was of opinion that a plaintiff, who "has suffered a loss by the negligence of two parties, was "at liberty, both at common law and in admiralty, to sue "both wrongdoers or either one of them at his election, "and 'it is equally clear that, if he did not contribute to "'the disaster, he is entitled to judgment in either case "'for the full amount of his loss. He may proceed "'against all the wrongdoers jointly, or he may sue them "'all or any one of them separately. * * * Co- "'wrongdoers, not parties to the suit, cannot be decreed "'to pay any portion of the damage adjudged to the "'libellant, nor is it a question in this case whether the "'party served may have process to compel the other "'wrongdoers to appear and respond to the alleged "'wrongful act.' A like ruling was made in *The Juni-* "*ata*, 93 U. S., 337, in which a libel was filed by the "United States as owner of the cargo of a flatboat in tow "of one of two vessels."

The New York, 175 U. S., 187, 209.

This ruling was in accord with earlier decisions of the Court.

The Atlas, 93 U. S., 312.
The Juniata, 93 U. S., 337.
The Virginia Ehrman, 97 U. S., 312.
The Beaconsfield, 158 U. S., 303.

The " law of the case " so far as the cargo interests are concerned was thereby declared and determined, and the direction of the mandate established the rule of conduct for the District Court.

The present contention of the petitioner that the cargo interests should recover only so much from the *New York* as will equalize the burdens of the two steamers, and should then seek recovery of the balance of their claims through fresh suits against the *Conemaugh*, would override the rule already expressly laid down in this case.

B. The fact that the recovery on behalf of certain of the cargo interests was made in the name of the shipowner " as trustee " is immaterial.

There is no confusion between the interests of the *Conemaugh's* cargo and the interests of the *Conemaugh* herself.

The Beaconsfield, 158, U. S., 303, 307.

At the outset of the litigation the line of demarcation was clearly drawn.

The libel filed by the owner of the *Conemaugh* set up separately the items of loss to the steamer and to her cargo (*Libel, Art. 5 p. 5*) and then alleged:

" The aggregate amount of damage here sued for and " sustained by the libellant *as owner* of the said propeller " *Conemaugh* and also *as trustee* for the owner of the " said cargo, is, as near as the same can be ascertained, " the full sum of seventy thousand dollars " (*Libel, Art. 6, p 5*).

At that time, only three weeks after the collision, there had been no opportunity to adjust the details of losses. Thereafter certain of the cargo underwriters specifically intervened in the cause, and asserted for themselves their respective interests (*Petition, pp. 15, 19; Stipulation, pp. 23, 24*), and took a decree in their own names for their losses (*Decree, pp. 24, 25*).

The other cargo underwriters permitted their interests to remain in the representation of the shipowner " as trustee "; but this Court, in determining the rights of the

cargo when the case was first heard here, made no discrimination against them.

The New York, 175 U. S., 187.

Nor did the District Judge when he entered the decree of his Court under the mandate of this Court.

While he gave to each of the intervening cargo underwriters specific decrees for their respective losses, he recognized just as fully the identity of the losses of the other cargo interests by the following provision:

"And it further appearing that the owners of said cargo "and their underwriters, other than the intervenors, have "suffered damage by said collision in the sum of $19,- "627.67 for which the said Erie & Western Transporta- "tion Company appears in this suit *as trustee only*, it is "further ordered, adjudged and decreed that said trustee "recover from the said Union Steamboat Company, and "its surety, *in trust, for the said owners and under- "writers on cargo* the aforesaid sum of $19,627.67, with "interest thereon at the rate of seven per cent. per "annum from July 3, 1896, until paid" (*Decree, p. 25*).

The *New York* has paid the decree in favor of the intervening cargo underwriters (*3d Assignment of Error, p. 27*), and now seeks to avoid the payment of other losses of the same class, at least so far as such payment would impose upon her, in connection with her own losses and the amounts already paid by her, a greater burden than one-half of all losses.

C. The present contention of the petitioner that recoupment should be allowed, even at the cost of those cargo underwriters whose interests have been represented by the owner of the *Conemaugh* as trustee, is unsound.

Recoupment is claimed by the petitioner against the owner of the *Conemaugh* both in respect of the claim put forward in the interest of the *Conemaugh* and in respect of the claim put forward as trustee for cargo underwriters.

When application was made to this Court for a writ of *mandamus* to require the District Judge to modify the decree entered by him under the mandate, so that it should provide for such recoupment, the Court said:

"But no question of recouping one-half of such dam-
"ages to the cargo from the moiety of damages
"awarded the *Conemaugh* was made by counsel or passed
"upon by this Court. It is now insisted that under the
"cases of *The Chattahoochee*, 175 U. S., 540, and *The*
"*Albert Dumois*, 177 U. S., 240, this should have been
"done. This may be so, but it is an entirely new ques-
"tion quite unaffected by the case of the *New York*, and
"if the Court erred in refusing to allow such recoupment
"the remedy is by appeal and not by mandamus."

Ex parte Union Steamboat Co., 178 U. S., 318, 320.

Taking up the question as a new one: Should recoupment be permitted, and, if so, to what extent and at whose expense?

The counsel for the *Conemaugh* presents reasons why recoupment should not be permitted now in this cause to the diminution of the decree made in favor of the owner of that vessel. Recoupment should not be permitted to the diminution of the decree made in favor of the shipowner as trustee for cargo underwriters.

The shipowner, so far as the cargo is concerned, occupies a purely representative.

A trustee has no right to himself apply the money of his ward to the satisfaction of his own debt; and, of course, a Court would not direct such application.

Here the petitioner has paid those cargo underwriters who intervened prior to the last District Court decree (*3d Assignment of Error, p. 27*), and now asks that the amount of such payment (together with the petitioner's own losses) be offset or recouped against the amounts due from the petitioner to other creditors of the same class sufficiently to equalize the burdens of the two steamers.

Logically under such contention, by a slight change of figures, the entire claims against the petitioner of those cargo underwriters who have been represented by the shipowner as trustee might be *extinguished* by the fact that the petitioner had paid other cargo underwriters in full.

Two cargo owners, having equal interests, might, side by side and at joint expense, pursue the owner of a colliding

ship through the Courts for years; and then such shipowner might pay one cargo owner in full, plead such payment as a satisfaction of his share of the liabilities arising from the collision, and lawfully remit the other cargo owner to a new suit against the other shipowner.

D. The claim of the petitioner to recoupment at the cost of the cargo underwriters was not presented by its appeal to the Circuit Court of Appeals.

The writ of *certiorari* of this Court was issued to the Circuit Court of Appeals (*writ of certiorari, p. 52*), and called for the record as it then stood in that Court. That record related to the assigned errors of the District Court, and to such errors only.

The present petitioner had appealed from the decree of the District Court (*Appeal, p. 26*), and had assigned errors in accordance with the rules and practices of the Court, which provide:

Rule 11. "The plaintiff in error, or appellant shall file " with the Clerk of the Court below, with his petition for " the writ of error or appeal, an assignment of errors, " which shall set out separately and particularly each " error asserted and intended to be urged. No writ of " error or appeal shall be allowed until such assignment " of errors shall have been filed. When the error alleged " is to the admission or to the rejection of evidence, the " assignment of errors shall quote the full substance of " the evidence admitted or rejected. When the error al- " leged is to the charge of the Court, the assignment of " error shall set out the part referred to *totidem verbis*, " whether it be in instructions given or in instructions " refused. Such assignment of errors shall form part of " the transcript of the record, and be printed with it. " When this is not done, counsel will not be heard, except " at the request of the Court; and errors not assigned " according to this rule will be disregarded, but the Court, " at its option, may notice a plain error not assigned."

Rules U. S. Circuit Ct. of Appeals, 6th Circuit.

The only assignment of error filed by the petitioner that relates specifically to a claim to recoupment is the third, which is:

"Third, That the Court erred in not permitting the " Union Steamboat Company to offset or recoup any part

" of the damages paid on account of loss or the damage to " the cargo of the steamer *Conemaugh* against the claim " for damages sustained by the libellant *as owner* of the " steamer *Conemaugh*."

(*Third Assignment of Error, p. 27.*)

The libel had drawn carefully a line of distinction between the claim of the libellant " *as the owner* of the said propeller *Conemaugh*" and its claim " *as trustee* for the owners of the said cargo (*Libel, Art. 6, p. 5*); and likewise the decree against which error was assigned had provided specifically that the libellant should recover one item as " being one-half of the damage to said *Conemaugh*, less " one-half of the damage suffered by the said *New York*," and another item as trustee " in trust for the said owners " and underwriters on cargo" (*Decree, p. 25*).

When, therefore, the appellant assigned error in that the decree did not permit an offset or recoupment " against " the claims for damages sustained by the libellant *as* " *owner* of the *Conemaugh*," the assignment fitted exactly the form of the decree, and effectively disclaimed any right of offset or recoupment against the recovery allowed to the libellant " as trustee."

Position was thereby definitely taken by the libellant, and thereafter the libellant had no right to ask the Circuit Court of Appeals to consider the right or the wrong of an offset or recoupment against the trust fund.

Van Gouden vs. *Iron Co.*, 3 C. C. A., 294.
City of Findlay vs. *Pertz*, 26 C. C. A., 662, 665.
Lloyd vs. *Chapman*, 53 C. C. A., 474, 475, 476.
McFarlane vs. *Golling*, 22 C. C. A., 23, 24.
Savings & Loan Society vs. *Davidson*, 38 C. C. A., 365, 371.

The Circuit Court of Appeals, upon the record before it, could not consider an offset or recoupment against the trust fund.

That record has been brought before this Court for its action; but it would seem that such action must be sub-

ject to the same limitations that were operative in the Circuit Court of Appeals.

E. Any confusion that existed through the dual role of the libellant in appearing first in its own interest to recover its own damages, and, secondly, in the interest of the owners and underwriters of cargo to recover as trustee their damages, is eliminated by the intervention in this Court of those underwriters who had not intervened in the District Court, but who had been content with representation by their trustee.

By order duly entered October 20, 1902, the Mannheim Insurance Company, the London Assurance Corporation, the Firemen's Fund Insurance Company and the British and Foreign Marine Insurance Company (Limited) have been permitted to intervene in this Court and to appear for the protection of their respective interests in the amount of $19,627.67 awarded to the libellant as trustee for owners and underwriters of cargo by the decree now under review.

Order U. S. Supreme Court, October 20, 1902.

Third.

THE DISTRICT COURT PROPERLY DECREED INTEREST AT THE RATE OF SEVEN PER CENT PER ANNUM.

The mandate of this Court under which the District Court acted, directed that interest upon the decree should "be at the same rate per annum that decrees bear in the "courts of the State of Michigan" (*Mandate, p. 23*).

The District Court decreed interest at the rate of seven per cent. per annum—

"that being the rate per annum that judgments and de-"crees bear in the courts of Michigan under the statutes "of said State."

Decree, p. 24.

The petitioner assigned as error:

" That the court erred in allowing interest on the vari-
" ous sums decreed to be due to the libellant and the in-
" tervenor at the rate of seven per cent. per annum."

Second Assignment of Error, pp. 26, 27.

Upon appeal, the United States Circuit Court of Appeals held that the allowance of interest at the rate of seven per cent. per annum was correct.

Opinion, pp. 48-51.

Under the most recent compilation of the public laws of Michigan, made in 1897, the allowance of interest upon decrees at the rate of seven per cent. per annum is explicitly directed.

Sec. 6. " Interest may be allowed and received upon all
" judgments at law for the recovery of any sums of
" money, and upon all *decrees* in chancery for the pay-
" ment of any sum of money, whatever may be the cause
" or form of action or suit in which such judgment or
" decree shall be rendered or made; and such interest
" may be collected on execution, *at the rate of seven per*
" *centum per annum;* Provided, that on a judgment ren-
" dered on any written instrument, having a different
" rate, the interest shall be computed at the rate speci-
" fied in such instrument, not exceeding ten per centum."

Section 4865 Compiled Laws of Michigan, 1897.

The provision there incorporated in the compiled laws was made a law in Michigan in 1855, in amending Section 8 of Chapter 6 of the Revised Statutes of 1838.

Session Laws of 1855, p. 31.

It next appeared in a compilation of the public statutes of Michigan made in 1857 under authority given by the Legislature.

Section 1317 Compiled Laws of Michigan, 1857.

Then it appeared in a similar compilation made in 1871.

Section 1635 Compiled Laws of Michigan, 1871.

It appeared again in a compilation made in 1882.

Section 1597, Howell's Annotated Statutes.

And finally in the compilation of 1897.

Section 4865, Compiled Laws of Michigan, 1897.

Each of these issues of public statutes was made under legislative authority by Commissioners duly appointed to collect and compile all the general laws "*in force*" in the State.

There is no room for difference of opinion respecting the meaning of the statute which we have quoted.

The petitioner, in support of its assignment of error, does not seek any different construction of the terms of the statute than that adopted by the District Judge.

It insists, however, that the statute was repealed in 1891 by an act which established six per cent. per annum as the lawful rate of interest, and that the rate of interest was further reduced to five per cent. in 1899.

The Act of 1891 was of four sections, and was entitled:

"An Act to regulate the interest of money on account, "interest on money judgments, verdicts, etc."

Session Laws of 1891, p. 197.

The first section of this Act was:

"Section 1. The People of the State of Michigan enact: "That the interest *of money* shall be at the rate of six "dollars upon one hundred for a year, and at the same "rate for a greater or less sum, and for a larger or shorter "time, except that in all cases it shall be lawful for the "parties to stipulate in writing for the payment of any "rate of interest not exceeding eight per centum per "annum; provided, that this Act shall not apply to exist-"ing contracts, whether the same be either due, not due "or part due."

The second section provided only that a stipulation for usurious interest should not make the contract void.

The third section provided only that it should be the duty of a Court to declare void all interest upon any contract made in violation of the Act.

The fourth section was:

"Section 4. All Acts or parts of Acts contravening the "provisions of this Act are hereby repealed."

Session Laws of 1891, p. 198.
Section 4856, Compiled Laws of Michigan, 1897.

The later Act of 1899 merely re-enacted the first section of the Act of 1891, substituting five per cent. for six per cent. as the standard interest rate "of money," and substituting seven per cent. for eight per cent. as a permissible rate under special stipulation.

Session Laws of 1899, p. 324.

It is to be noted that neither the Act of 1891 nor the Act of 1899, make any provision in the body of those acts for the rate of interest on judgments or decrees; but that in each of said Acts provision was made only for the rate of interest "of money."

As far back as 1838 the statutes of the State distinguished between interest "of money" and interest on "judgments" and "decrees."

The third section of Chapter 6 of the Revised Statutes of 1838 provided:

"The interest *of money* shall continue to be at the rate "of seven dollars and no more, upon one hundred dol- "lars for a year, and at the same rate for a greater or less "sum, and for a longer or shorter time, &c."

And the eighth section of the same chapter provided:

"Interest may be allowed and received upon all judg- "ments at law for the recovery of any sums of money "and upon all decrees in chancery, &c."

The one section supplied the phrases and form of the Acts of 1891 and 1899 relating to interest of "money"; while the other, after amendment in 1855, has stood unchanged for forty-seven years.

The contention of the petitioner that the fourth section of the Act of 1891 repealed the existing provision for interest on judgments and decrees is unsound.

That section repealed only "all acts, or parts of contravening the provisions" of the Act of 1891.

The Act of 1891 related in terms only to interest "of money," and the petitioner, to give body to its contention, is forced to claim that the Act in all its provisions, including the repealing section, relates not only to interest "of money," but also to interest "on judgments, &c.," because title of the Act is

"An Act to regulate the interest of money on account, "interest on money judgments, verdicts, etc."

Session Laws of 1891, p. 197.

This contention requires that "decrees" be included in the "etc." of the title to the Act.

There are several lines of argument against the contention of the petitioner.

A. The repeal of a statute is not to be effected by inference or by implications but only by express legislation.

Rosecrans vs. *United States*, 165 U. S., 257–262.

The United States Circuit Court of Appeals well defined the status of the title of an Act:

"While the title of an Act should not be altogether "ignored and may afford a key to unlock the meaning of "a very doubtful statute, yet the title of an Act cannot "be used to extend the provisions of an Act so as to in- "clude within its scope that which without such aid "would plainly not be included. *Hayden* v. *Barney*, 5 "Wall., 107; *Goodlett* v. *L. & N. R. Co.*, 122 U. S., 391, "408; *United States* v. *Palmer*, 3 Wheaton, 610."

Opinion, p. 51.

The title of the Act of 1891 cannot be incorporated into the body of Act with such effect as to give to the repealing clause of that Act the power to annul all statutes specifically providing for interest on "judgments" and "decrees."

B. The statutes of the State of Michigan regulating the rate of interest "of money" have always been distinct

from those regulating the rate of interest on "judgments" and "decrees."

Supra, pp. 16, 17.

The subjects have not been treated as kindred.

C. The phraseology of the only section of the Act of 1891 regulating the rate of interest disputes the contention of the petitioner.

That section purports only to regulate at six per cent. the interest "of money," and then, as though carefully to shut out any other application of the regulations, it provides:

"Except that *in all cases* it shall be lawful for the par-
"ties to stipulate in writing for the payment of any rate
"of interest not exceeding eight per cent. per annum," &c., &c.

The words "in all cases" refer to all possible instances falling within the limits of the Act, and the Act authorizes the parties in all such cases to stipulate in writing for a rate higher than six per cent.

Would such phraseology be used if the Act contemplated the regulation of interest on judgments?

Would the judgment creditor and the judgment debtor be the parties to make such a stipulation?

D. In 1895 the Legislature of Michigan passed an Act, "that all the general laws *in force* in the State" be "collected and compiled," and provided for the appointment of two Commissioners to examine the statutes thus collected and to certify the same to be a correct compilation of all general laws "in force."

The scope of the compilation is defined in the first section of the Act:

"Section 1. That all the general laws *in force* in this
"State, and all general Acts and parts of Acts passed by
"the present Legislature which shall be approved and be-
"come laws, shall be collected and compiled without alter-
"ation under their appropriate heads and titles, etc."

Session Laws of Michigan, 1895, Act 268.

The Commissioners duly proceeded with their work.

They retained the old statute of 1838, as amended in 1855, regulating the rate of interest on "judgments" and "decrees" at seven per cent. then appearing as Section 1597 of Howell's Annotated Statutes of 1882, and made it Section 4865 of the new compilation.

They determined that the remaining portion of the Act of 1838, regulating the rate of interest "of money" had been repealed by the Act of 1891, and they inserted the provisions of the Act of 1891 as Section 4856 of the new compilation.

The compilation was then reported by the Commissioners to Governor Pingree, and was laid by him before the Legislature of 1897. That body provided for the incorporation therein of the general legislation of 1897, and for the "printing, binding and distribution" of the work under the title of Compiled Laws of the State of Michigan, 1897.

Session Laws of Michigan, 1897, Act 26.

E. The Courts of the State of Michigan have been in full accord with the Commissioners who made the compilation of 1891.

In 1894,—three years after the adoption of the Act of 1891, and, therefore, three years after the time when according to the petitioner's contention, the statute regulating the rate of interest on "judgments" and "decrees" at seven per cent. was repealed, the Supreme Court of the State enforced the statute, then commonly known as Section 1597 of Howell's Annotated Statutes, by allowing interest at seven per cent. upon a judgment for appellant's costs on an appeal from the Probate Court:

"A judgment for costs is as much a judgment as any "other, and is, therefore, within the terms of the statutes "* * * Interest upon claims allowed against the "estates of deceased persons, may be claimed under Sec. "1597, Howell's Ann. Statutes, which is broad enough to "cover the present case."

Hayden vs. *Hefferan*, 99 Michigan, 262.

In a still later case the same Court said:

"As between individuals it was settled in Hayden *vs.* "Hefferan that the prevailing party is *entitled to interest*

" *upon the costs* from the date of the judgment or de-
" cree; and that the State is subject to precisely the
" same liability for costs and for the incidents of a judg-
" ment as an individual would be, with the single excep-
" tion as to the method of collecting the demand."

F. & P. M. R. Co. vs. *State Auditor*, 102 Michigan, 500.

The contention of the petitioner necessarily leads to the claim that the Act of 1891 regulated interest at five per cent., not only upon "money," but upon all forms of debt, forbearance or adjudicated amounts, and that it repealed all statutes regulating rates of interest in all cases.

This would involve a repeal of the statutes regulating interest upon taxes and upon State funds.

But in 1896 the courts of Michigan construed and sustained, in respect of interest, such statutes antedating the Act of 1891.

University Regents vs. *Auditor General*, 109 Michigan, 134.

F. The title of a statute has little effect in the construction of the statute under ordinary circumstances:

" While the title to a statute should not be entirely
" ignored in determining the legislative intent, it cannot
" be used 'to extend or restrain any positive provision
" 'contained in the body of the act,' and is of little weight
" even when the meaning of such provisions is doubtful."

Goodlett vs. *Louisville Ry. Co.*, 122 U. S., 391, 408.

There are special explanations respecting the title of the Act of 1891, which show that it has even less than usual significance.

The legislative journals disclose that in 1891 a bill was introduced in the lower House of the Michigan Legislature designed to amend both the existing statute regulating the rate of interest "of money" and the existing statute regulating the rate of interest on "judgments" and "decrees."

It was as follows:

"A BILL

"To amend sections three and six of chapter forty-one of
" the compiled laws of 1871, being sections 1594 and
" and 1597 of Howell's Annotated Statutes, with refer-
" ence to interest on money and on judgments.

"SECTION 1. The People of the State of Michigan enact, "That sections three and six of the compiled laws of "1871, being compilers sections 1594 and 1597 of Howell's "annotated statutes of Michigan, 'with reference to in-"'terest on money and interest on judgments, verdicts, "'etc.,' be and the same are hereby amended to read as "follows:

"(Sec. 1594.) SEC. 3. The interest of money shall be "at the rate of five dollars upon one hundred dollars for "a year, and at the same rate for any greater or less sum "and for a longer or shorter time, except that in all cases "it shall be lawful for the parties to stipulate in writing "for the payment of any rate of interest not exceeding "ten per cent. per annum: Provided, that this act shall "not apply to existing contracts, whether due, not due, "or past due.

"(Sec. 1597.) SEC. 6. Interest may be allowed and "received upon all judgments at law, for the recovery of "any sum of money, and upon all decrees in chancery for "the payment of any sum or sums of money, whatever "may be the form or cause of action or suit in which "such judgment or decree may be rendered or made; and "such interest may be collected on execution, at the rate "of five per cent. per annum: Provided, that on a judg-"ment or decree upon any written instrument having a "different rate the interest shall be computed at the rate "specified in such instrument, not exceeding ten per cent. "per annum.

"SEC. 2. Act No. 138 of the session laws of 1887 is hereby "repealed, except as to all matters arising thereunder "before this act takes effect."

The bill was passed in the lower House.

House Journal, Vol. 1, pp. 100-789; Vol. 2, p. 1563.

The Senate did not concur with the bill as received, but after various amendments, passed it and sent it back to the lower House in severely modified form.

This bill was accepted by the lower House and became the Act of 1891.

In tracing the progress of the Act through the two houses we find that the title originally conformed with the body of the Act in regulating both the rate of interest "of money," and the rate of interest upon "judgments" but that the amendments of the title did not keep pace with the amendments of the body.

This history of the Act indicates a clear and deliberate judgment of the Legislature to leave the rate of interest in "judgments" and "decrees" where they found it and to change the rate of interest "of money."

In arriving at this result, they cut out much of the body of the bill that was under consideration, but omitted to give like attention to the title, thus giving an apt illustration to the remarks of this Court in *Hayden* vs. *Barney:*

"The title to an Act furnishes little aid in the construc-
"tion of its provisions, * * * It cannot be used to
"extend or restrain any positive provision contained in
"the body of the Act. It is only when the meaning is
"doubtful that resort may be had to the title, and even
"then it has little weight. *It is seldom the subject of*
"*special consideration by the Legislature.*"

Hayden vs. *Barney*, 5 Wallace, 107.

G. The petitioner has itself given a construction to the Act of 1891, indicating its recognition that the statute regulating the rate of interest on "judgments" and "decrees" at seven per cent. is still in force.

The decree of the District Court gave the same rate of interest, seven per cent., to those cargo underwriters who had thus intervened, as it gave to the owner of the *Conemaugh* individually and "as trustee."

Decree, pp. 24, 25.

The petitioner has paid to those cargo underwriters their respective decrees without availing of its right to have the matter reviewed.

Third Assignment of Error, p. 27.

Fourth.

THE ARGUMENT OF THE PETITIONER THAT SIX PER CENT. SHOULD BE ALLOWED AS BEING THE RATE UNIFORMLY ALLOWED IN THE ADMIRALTY COURTS OF THE UNITED STATES IS NOT ADMISSIBLE UPON THE PRESENT RECORD.

Whether or not six per cent. is the rate uniformly or ordinarily allowed in the Admiralty Courts of this country is a question not within the range of present inquiry.

This Court has already determined that interest should be paid "at the same rate per annum that decrees bear in "the courts of the State of Michigan."

The New York, 175 U. S., 187, 210.
Mandate, p. 23.

The only question now before this Court, so far as the rate of interest is concerned, is whether the District Judge has correctly ascertained the rate of interest payable upon decrees in the State of Michigan.

Ex parte Union Steamboat Co., 178 U. S., 317, 320.
The Lady Pike, 96 U. S., 461.
Ex parte Sibbald vs. *United States*, 12 Peters, 488, 492.

Fifth.

THE DECREE OF THE DISTRICT COURT SHOULD BE MODIFIED IN RESPECT OF THE ADJUSTMENT OF COSTS, AS PROVIDED IN THE OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS, AND SHOULD BE IN ALL OTHER RESPECTS AFFIRMED, WITH LEAVE TO THOSE CARGO UNDERWRITERS WHO HAVE INTERVENED IN THIS COURT TO RECOVER IN THEIR OWN NAMES THEIR RESPECTIVE INTERESTS IN THE RECOVERY MADE BY THE OWNER OF THE CONEMAUGH AS TRUSTEE.

WILHELMUS MYNDERSE,
Advocate for Intervenors.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 97.

THE UNION STEAMBOAT CO., PETITIONER,

vs.

THE ERIE AND WESTERN TRANSPORTATION CO., LIBELLANT, AND THE MANNHEIM INSURANCE CO. AND OTHERS, INTERVENORS.

It is hereby requested that leave be granted to any of the parties to seek in the district court, under the mandate of this court, such apportionment of the salvage expenses awarded to the libellant as was reserved under the final paragraph of the district court decree of July 3, 1896.

December 1, 1902.

GOULDER, HOLDING & MASTEN,
Proctors for E. and W. T. Co., Libellant.
WILHELMUS MYNDERSE,
Proctor for Intervenors.

[Endorsed:] File No. 18,159. Supreme Court U. S., October term, 1902. Term No. 97. The Union Steamboat Co., petitioner, *vs.* The Erie and Western Trans. Co. *et al.* Request for leave to any of the parties to seek apportionment in district court under mandate of this court. Filed Dec. 1, 1902.